IN THE

Supreme Court of the United States.

C. V. BROWNE, PETITIONER,

VS.

THE UNION PACIFIC RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays this court for a writ of certiorari to review a final decision of the Supreme Court of the State of Kansas which affirmed a judgment, based on the pleadings, against him for costs and in favor of the railroad company.

Petitioner, plaintiff in the trial court, sued to recover damages alleged to have been sustained by him as a result of paying value in good faith for four Interstate Order Bills of Lading covering four cars of wheat sought to be applied on a contract of sale to him, in reliance on the recitations therein contained, as to the dates when such shipments originated. He alleged that he bought such wheat under a contract which provided that it was to be shipped from point of origin by November 9, 1920 and that he sold it on the same terms; that the bills of lading tendered to him by his vendor were executed by defendant's agent and showed shipment within contract time; that he paid the drafts to which

said order bills were attached in reliance on such dates; that such dates were erroneous, the shipments not having originated prior to November 9th as stated therein; that by reason of such mis-dating he was unable to apply said four cars of wheat on his contract of sale, to his damage.

Defendant, the railroad company in its answer, admitted that plaintiff took up the four mis-dated bills of lading as alleged and that they were signed by its agent at Denver, Colorado, but alleged, among other things, that such order bills were in fact prepared by the consignor on blanks furnished by it and that its agent signed same in the rush of business, relying on the good faith of the consignor, and that said agent's signature was procured by fraud of the consignor and it was without the scope of the authority of said agent to sign bills of lading containing false or erroneous statements.

Plaintiff demurred to the foregoing part of defendant's answer on the theory that bills of lading were negotiable under the provisions of the Federal Uniform Bill of Lading Act of 1916, and hence that any inquiry into the circumstances under which the order bills originated was precluded. Said demurrer was overruled and plaintiff electing to stand thereon, judgment was rendered against him for costs and he appealed to the Supreme Court of Kansas. In its final decision the Supreme Court of Kansas affirmed the trial court, holding that that portion of defendant's answer demurred to did constitute a defense as the Federal Uniform Bill of Lading Act, known as the Pomerene Act, did not make

interstate order bills of lading strictly negotiable; that as Section 22 of said act specifically defines the matters as to which a carrier issuing an order bill is liable, such liability goes no further; that while said Section 22 makes a carrier issuing an order bill liable thereon to the holder thereof who has given value therefor in good faith "relying upon the description * * * of the goods, for damages caused by * * * their failure to correspond with the description thereof in the bill at the time of its issue," the date of shipment of the goods as shown by the order bill is no part of the description. "A description of a car load of goods is a statement or recital of their character, of their sort, kind or species."

Prior to the passage of the Pomerene Act on August 29, 1916, this court by a long line of decisions uniformly held, under the Federal common law rule, that an interstate shipper's order bill of lading was not negotiable, being merely a contract for the performance of a certain duty by the carrier issuing it, all inquiry into the transaction in which it originated not being precluded, the doctrine of *bona fides* of purchases only applying in a limited sense (*Shaw* v. *Bank*, 101 U. S. 557; *Pollard* v. *Vinton*, 105 U. S. 7) that a carrier was not bound by untrue recitals in such an order bill, the agent signing same acting beyond the scope of his authority (*St. Louis I. M. & S. Rly. Co.* v. *Knight*, 122 U. S. 79; *Friedlander* v. *T. P. Rly. Co.*, 130 U. S. 416; *The Carlos F. Roses*, 177 U. S. 655); and that a carrier was not liable to an innocent purchaser thereof for damages re-

sulting from a mis-dated order bill (*A. T. & S. F. Rly. Co.* v. *Harold*, 241 U. S. 371).

But the Pomerene Act specifically makes order bills negotiable, providing in detail for their negotiation and applying the doctrine of *bona fides* of purchasers in almost every section. Section 22 being:

> (22) "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of those actual or apparent authority includes * * * the issuing of bills of lading * * * the carrier shall be liable to. * * * (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof, in the bill at time of its issue."

The Federal questions involved in the instant case, and which we think should be definitely determined by this court are: The extent to which the Pomerene Act has changed the old common law rule as to the negotiability of order bills; what explanation may be made by a carrier of the circumstances surrounding the issuance by it of order bills which are negotiated to purchasers for value; and whether Section 22 of the Pomerene Act limits the reliance which a purchaser of an order bill can place upon "the description therein of the goods" to a statement or recital in such an order bill of the character, sort, kind or species of such goods.

Billions of dollars annually are paid for, or advanced on, order bills in reliance on the recitals thereof and in the belief that one to whom such an order bill is

negotiated is protected to the same extent as the purchaser of ordinary commercial or negotiable paper. The Pomerene Act of forty-five sections was enacted with the very evident and patent purpose of giving to order bills the broad degree of negotiability possessed by other commercial paper. And Section 22 thereof specifically makes carriers liable for non-receipt of the goods described in an order bill and for a mis-description therein of the goods. The first liability mentioned was no doubt meant to cover the numerous instances, many of which are reported, where a lading, though fraud with or upon an agent, might be issued and negotiated without receipt of the goods or where they were over-billed, and the other liability, for mis-description, was surely meant to cover all other damages to an innocent purchaser resulting from untrue recitals in an order bill, such as mis-dating.

The Carmack Amendment had long made carriers liable to holders of order bills for loss, injury or damage to the *property* received for interstate transportation. Section 22 of the Pomerene Act pertains to damages resulting in the *negotiation of* order bills. As the increased use of bills of lading as commercial paper made necessary the enactment of a Uniform Federal Bill of Lading Act, and as a grave and important question has been raised in this case as to the liability of carriers under such act for damages resulting from the negotiation of order bills containing untrue statements of certain facts, a writ of certiorari should be issued herein to the

end that such question may be reviewed by this court and finally determined by it.

Petitioner therefore respectfully prays that a writ of certiorari be issued herein to review the final decision of the Supreme Court of Kansas so that the question may be presented to and determined by this court whether order bills are in fact strictly negotiable under the Pomerene Act and whether the description of goods in an order bill, under section twenty-two of such act, refers solely to a statement of their character, sort, kind or species.

Respectfully submitted,

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Attorney for Petitioner.
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Wichita, Kansas.
Of Counsel.

BRIEF OF PETITIONER.

Surely the intent of the Uniform Federal Bill of Lading Act of 1916 was to give to order bills such a degree of negotiability as would protect purchasers thereof who relied upon the recitations therein contained. Prior to the passage of that act the question of the rights of such purchasers was repeatedly before this court. The very purpose of the act was to change the Federal rule as theretofor held by this court and to give to order bills the usual attributes of commercial paper. Order bills are playing an increasingly important part in the commerce of our country. Their negotiation not only facilitates commerce but the prompt movement of our crops and products would be almost impossible without it.

The grain trade well illustrates the extent and necessity of such negotiation. The country elevator operator can finance his business with small capital for as soon as he has purchased enough grain to fill a car he can at once realize thereon by drawing his sight draft with bill of lading attached which he cashes at his local bank, which relies on all the recitations contained in such order bill. The wholesale dealer takes up such sight draft in reliance on such recitals and immediately realizes thereon by drawing out on the mill or the exporter, which draft is paid in reliance on the order bill thereto attached.

As alleged by petitioner in his pleadings in the trial court time is the essence of all grain contracts which are universally based on a date of shipment, not date of delivery. And such date of shipment is determined by the date in the order bill furnished by the seller, which date is inserted by the carrier. Literally hundreds of millions of dollars are paid out annually in the State of Kansas alone in reliance on the dates appearing in order bills covering grain shipments. Also reliance is frequently placed on the point of origin as stated in an order bill, or upon recitals as to whether freight has been prepaid. These items of information are placed in an order bill by the carrier issuing same. Why? Order bills, by their very nature, are meant to be negotiated. If such recitals have no function to perform in such negotiation, why are they inserted by the carriers?

The Washburn Crosby Milling Company of Minneapolis may buy 100,000 bushels of wheat from a Kansas dealer, at a price basis delivered Minneapolis, same to originate in a certain part of Kansas where the wheat has a particularly high protein content, and to be shipped in September, billed via Kansas City for Federal inspection. Such wheat is tendered by the seller in car lots by drafts drawn for the sale price to which are attached properly endorsed order bills. Before paying for each car of wheat so tendered the mill carefully inspects the order bill attached to each draft to ascertain therefrom whether it was shipped within contract time, and from the proper point of origin, whether it was properly billed and whether it bore the notation by the

carrier "freight prepaid." And reliance is placed on every one of such recitations contained in the order bill. Yet if the majority decision of the Kansas Supreme Court herein is correct all of such recitations might be untrue without making the carrier liable for damages resulting from mis-placed reliance thereon, as none of them comprises a part of the "description" of the wheat.

The Pomerene Act clearly makes a carrier liable for non-receipt of all or part of the goods "described" in an order bill, yet ordinarily the agent issuing an order bill has no personal knowledge of the actual number of pounds of grain or other commodity received in a certain car. But the agent necessarily knows the *date* when he issues such order bill. Or in case of an exchange lading, as in the instant case, the original order bill is surrendered to and is before him when he signs the exchange lading, and he has merely to *copy* correctly the date appearing therein.

It is very necessary that grain and other dealers know as speedily as possible whether, under the Pomerene Act, they can rely on recitals in order bills other than as to the character, sort or species of goods shipped. The instant case was brought squarely under the Pomerene Act and while the specific point involved was as to liability of a carrier for damages resulting from a mis-dated order bill, yet the decision of the Kansas Supreme Court is farther reaching than that, as it attempts to limit the "description" of goods in an order bill, as covered by section twenty two of the act, to a recital of their physical attributes. Just as though

a description of a girl would be complete without some data as to the date of her origin!

We believe the only decision of this court interpreting the Pomerene Act is *Pere Marguette Rly. Co.* v. *French,* 254 U. S. 538. Therein was involved the liability of a carrier for delivering a car of goods without requiring surrender of the order bill. In the opinion it is said:

> "Prior to the enactment of the Pomere Act, bills of lading were not negotiable instruments and one who did not have valid title to the goods could not by transfer of the bill of lading give a good title to a *bona fide* holder."
>
> "When, in the interests of commerce, the Federal Uniform Bill of Lading Act extended to bills of lading certain characteristics of negotiable paper in order to protect the *bona fide* purchaser of such bills, it was deemed proper to afford also certain protection to the carriers."
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> "The purchaser whom the act protects is he who is entitled to assume that the carrier has not delivered the goods and will not thereafter deliver them except to a person who holds the bill of lading. The purposes of sections 10, 11, and 12 is to give bills of lading *attributes of commercial paper.*"

If, in the interests of commerce, the Pomerene Act was enacted for the purpose of giving to order bills the attributes of commercial paper and to protect *bona fide* purchasers thereof, then surely such a purchaser who relies on the date thereof, or other data descriptive of the *shipment,* is entitled to the same protection as a purchaser who relies on the weight, color, or kind of *goods* as recited in such an order bill.

We think that the interpretation placed upon the provisions of the Pomerene Act by the Kansas Supreme Court herein is wrong, and that if is allowed to stand untold confusion will result in commercial circles. In the interests of commerce this court should definitely and finally construe the provisions of the act that are in question herein. And to that end a writ of certiorari should issue herein to review the decision of the Supreme Court of Kansas.

Respectfully submitted,

RAY CAMPBELL,
Attorney for Petitioner.

J. GRAHAM CAMPBELL,
Of Counsel.